

Disclosure in the 21st Century: A Comparative Analysis of Three Approaches to the Information Economy in the Guilty Plea Process

M Y L E S A N E V I C H *

ABSTRACT

The Criminal Justice System in Canada and the United States is no longer a system based upon trials, it is now a system of plea bargaining. Though the system of adjudication has changed, in the American Federal System disclosure obligations on the prosecution have not evolved. At the guilty plea stage disclosure obligations are not minimal, they are practically non-existent. This article sets the stage for the current state of the law in the American Federal System and then proposes three possible avenues for reform ranging from moderate to extreme. These proposed reforms are 1) a reimagining of *Brady* obligations in light of the Seventh and Tenth Circuits' interpretation of *Ruiz*; 2) a wholesale adoption of the American Bar Association's 1996 proposed reforms; or, 3) adopting the Canadian approach to disclosure obligations at the plea bargaining stage. The article concludes by advocating for the adoption of the Canadian model, suggesting that the American Bar Association Reform would be impractical and the reimagining of *Brady* would not go far enough to adapt to the 21st century method of criminal adjudication.

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I. INTRODUCTION

In the vast majority of cases in both Canada and the United States, the popular conception of the criminal trial process that we see on television and learn in high-school civics classes does not exist. The common expectation is a process where an individual is accused of a carefully defined crime, and prosecutors attempt to convince a judge and jury of their guilt beyond a reasonable doubt in an adversarial trial against a “vigorous and effective defence lawyer.”¹ Instead, over the past few decades the Criminal Justice systems of Canada and the United States have slowly transitioned from this adversarial process of adjudication by a neutral trier of fact, to a quasi-inquisitorial system where guilt is determined through negotiations with a member of the state bureaucracy.

In both Canada and the United States, a higher proportion of guilty verdicts are as a result of pleas, as opposed to trials.² Guilty pleas must be voluntary and informed, and courts will inquire into these two aspects, but otherwise they are subjected to little scrutiny and great deference. However, the current state of the law in the United States is jurisprudentially under-equipped to fairly and appropriately handle this transition. The law is stuck in a world of trials, not guilty pleas, and constitutional protections have not caught up to the new system of adjudication.

This article attempts to address this issue, first by establishing the current state of the law and its inherent failures, and then by transitioning to three potential avenues of reform: one grounded purely in pre-existing jurisprudence, one grounded in a fundamental shift in the administration of the criminal justice system itself, and finally one that is based upon the Canadian approach to this very same issue.

II. DISCOVERY OBLIGATIONS IN THE CRIMINAL PROCESS

The discovery process is a crucial procedural safeguard for the accused, helping to protect against wrongful convictions and compensate for the

¹ Gerrard E Lynch, “Our Administrative System of Criminal Justice” (1997-1998) 66 *Fordham L Rev* 2117 at 2118-2119.

² See e.g. Christopher Sherrin, “Guilty Pleas from the Innocent” (2011) 30 *Windsor Rev Legal Soc Issues* 1 at 2; see also US, Bureau of Justice Statistics, Federal Justice Statistics Program 2014 – Statistical Tables (March 2017), Table 4.2, online: <<https://www.bjs.gov/content/pub/pdf/fjs14st.pdf>> [BJS 2014].

investigatory power imbalance inherent in the system by allowing each side to adequately prepare their case.³ Expansive and meaningful discovery laws help protect against wrongful convictions by allowing the defence to adequately and vigorously challenge evidence, exposing potential eyewitness misidentifications and false confessions.⁴ In addition to ensuring a more fair and accurate criminal justice system, practitioners in jurisdictions with more expansive discovery regimes report a more efficient process, with fewer reversals and retrials, and more cases resolving earlier in the process.⁵ In the alternative, inadequate discovery laws undermine the due process rights of accused persons and threaten the reliability of outcomes.⁶

A. The Current American Approach

From a plain and textual reading of the Fifth and Sixth Amendments to the United States Constitution, it would appear that a defendant in the federal system would have access to a broad and liberal system of disclosure and discovery regarding the prosecution's case.⁷ The due process, nature and causes, and confrontation clauses would seemingly on their face necessitate some form of discovery and disclosure of inculpatory evidence.⁸ However, contrary to this reading of the constitution, there is no constitutional right to discovery of inculpatory evidence.⁹

A federal prosecutor's discovery obligations for inculpatory evidence are roughly encapsulated by Rule 16(a) of the *Federal Rules of Criminal Procedure*,

³ The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (Washington, DC: The Justice Project, 2007) at 1.

⁴ *Ibid.* Wrongful convictions in this sense can be grounded in multiple factors, but most commonly arise out of either factual or legal misunderstandings that appropriate disclosure would help address. For more examples and further explanation, see Sherrin, *supra* note 2 at 7–13.

⁵ The Justice Project, *supra* note 3.

⁶ *Ibid.*

⁷ US Const amend V, VI. Specific references are to the clause “nor be deprived of life, liberty, or property, without due process of law,” in the 5th Amendment, and “...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him,” in the 6th amendment.

⁸ After all, what use is a right to cross-examine adverse witnesses if that right does not include an ability to do a good job cross-examining by having materials available to you before trial.

⁹ As Judge Learned Hand stated in 1923, “While the prosecution is held rigidly to the

which sets out an extremely limited obligation. Regarding exculpatory evidence, the Supreme Court held in *Brady v Maryland* that “...the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹⁰ This right was later expanded in *United States v Bagley* to include evidence that can be used for impeachment purposes.¹¹ According to the Supreme Court, the duty to disclose this type of evidence is applicable even when there has not been a *Brady* request from the defendant.¹²

Unfortunately, *Brady* is largely inapplicable to the plea bargaining process. Not only does the disclosure obligation not trigger immediately, but even if it did, to find a violation of *Brady* a defendant would have to show “a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different.”¹³ Essentially *Brady* mandates prosecutors, convinced of the strength of their case (and potentially suffering from confirmation bias), to engage in a prospective analysis of potential exculpatory elements. This prospective analysis is then retroactively analyzed by judges, after having seen how all of the evidence plays out in order to determine if any piece, or pieces of information, would have changed the result. As the Supreme Court demonstrated in *United States v Turner*,¹⁴ this analysis is quite challenging.

The key flaw in this regime is threefold. First, the prosecution at this early assessment stage does not know the defence’s strategy, therefore it is hard to see how they can truly know if a piece of evidence could be utilized at trial. Second, it is easy to imagine a scenario in which exculpatory and inculpatory evidence intersect, with both sides seeing a piece of evidence as beneficial to their case and the prosecutor choosing not to disclose. Third, at the judicial assessment stage it is near impossible to retroactively assess

charge, he need not disclose the barest outline of his defence.” *United States v Garsson*, 291 F 646 at 649 (SD NY 1923).

¹⁰ *Brady v Maryland*, 373 US 83 at 87 (USSC 1963) [*Brady*].

¹¹ *United States v Bagley*, 473 US 667 (USSC 1985) [*Bagley*].

¹² See *United States v Agurs*, 427 US 97 at 107

¹³ *Bagley*, *supra* note 11 at 682.

¹⁴ *United States v Turner*, 582 US __ (USSC 2017) [*Turner*].

how the disclosure of that piece of evidence could have altered how the trial unfolded.¹⁵

Due to these failures inherent in the system, it is highly unlikely that almost any failure to disclose potentially exculpatory or impeachment evidence at the plea bargaining stage would meet the standard set by the Supreme Court. The conclusion we draw from this is even if upon appeal a defendant can show that the piece of evidence would fit into the *Brady/Giglio* framework, the applicability of harmless error analysis and the limits of hindsight make this protection effectively meaningless in the vast majority of cases.

III. PLEA BARGAINING AS THE HEGEMON OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

Plea bargaining has become so pervasive within the criminal justice systems of the United States that it can be said “to affect almost every aspect of [the] system, from the legislative drafting of substantive offences”¹⁶ to the rehabilitation process in correctional institutions.¹⁷ With this reality, some scholars argue that there are two options in practice; either society fully embraces a “system of negotiated case resolution that is open, honest, and subject to effective regulation [or] one that has been driven underground.”¹⁸

In 2012, of the 96,260 criminal defendants in the Federal System whose cases came to a resolution, 89% pled guilty, 8% had the charges dismissed, and only 3% went to trial.¹⁹ In 2014, among the 85,781 criminal defendants whose cases came to a resolution, a similar 89% of defendants pled guilty, with 2.5% of defendants going to trial.²⁰

As the Supreme Court of the United States observed in *Lafler v Cooper*, “the reality [is] that [the] criminal justice [system] today is for the most part

¹⁵ For example, compare the way the majority and dissent attempt to apply the test in *Turner*, *supra* note 14.

¹⁶ Albert W Alschuler, “Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System” (1983) 50 U Chicago L Rev 931 at 932.

¹⁷ *Ibid.*

¹⁸ *Ibid* at 935.

¹⁹ US, Bureau of Justice Statistics, Federal Justice Statistics, 2012 – Statistical Tables (January 2015), Table 4.2, online: <www.bjs.gov/index.cfm?ty=pbse%side=62>.

²⁰ BJS 2014, *supra* note 2, Table 4.2.

a system of pleas, not a system of trials.”²¹ In *Lafler*’s companion case *Missouri v Frye*, Kennedy J., put a finer point on this observation, stating: “[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.”²²

The conception of plea bargaining is somewhat at odds with the actual functioning of the justice system. From a bird’s eye perspective, the culture of the Canadian and American justice systems treats the parties to a criminal matter in similar fashion to those in a civil suit. Courts do not function as a truth-seeking organ of the state, instead they sit as neutral bodies to resolve disputes between formally equal parties.²³ Referring to the Federal Justice System of the United States Gerrard Lynch once observed:

While some special rules apply to criminal cases, in its essential structure a criminal case is nothing more than an ordinary lawsuit: the state, like a private party in a tort or contract action, is just one entity that may come before the court to present a claim for relief, and the defendant is nothing more or less than the party from whom that relief is sought. Just as in a civil case, if the plaintiff party elects to withdraw its complaint, or if the defendant acknowledges his liability and agrees to the relief, there is no longer a dispute for the court to resolve. And as in a civil case, the parties may settle their disagreement by jointly agreeing to some compromise, and if they do, the court will not (much) inquire into whether that is the “right” result under the law, for their compromise once again has the effect of leaving no dispute for the court to arbitrate.²⁴

The fundamental issue that arises from this reality though is that the parties are not equal. Defendants in the vast majority of cases lack the investigative resources of the state, and the funds to sustain a prolonged case. From this perspective to have a meaningful process of plea bargaining in line with the ethos of our adversarial systems the information gap must be narrowed. While defendants cannot commandeer the state to investigate all aspects of interest in their case, whatever the fruits of the state’s investigation are must be shared with the defence to have meaningful resolution discussions as anything close to resembling even parties.

In the face of this reality it is both strange and unsettling that the law has not adapted in the United States to the new order of the criminal

²¹ *Lafler v Cooper*, 132 S Ct 1376 at 1388 (USSC 2012) [*Lafler*].

²² *Missouri v Frye*, 132 S Ct 1399 at 1407 (USSC 2012), quoting Robert E Scott & William J Stuntz, “Plea Bargaining as Contract” (1992) 101 Yale LJ 1909 at 1912 [emphasis in original].

²³ Lynch, *supra* note 1 at 2120.

²⁴ *Ibid* at 2120–2121.

process. Effectively the current state of the law is that 97% of accused, by virtue of deciding to plead guilty, are not afforded the already minimal disclosure obligations guaranteed by the Fifth Amendment. Not only is this current interpretation of the law remarkably under-inclusive and contrary to the underlying principles of due process as set out in the *Bill of Rights*, but it is also dangerous and risks wrongful convictions.

IV. PROPOSED REFORMS

In the face of this challenge in the criminal justice system, I propose three possible paths for reform. These three paths range from a moderate expansion of existing jurisprudential approaches, to a fundamental reimagining of the methods and mechanisms of discovery in the criminal process. The first proposed reform would fall into the first category, and is a moderate expansion of the rights of accused persons that relies on existing jurisprudence. Under this approach prosecutors would be required to disclose *Brady* material before a guilty plea, with a failure to do so vitiating the voluntariness of the plea. The second proposed reform is significantly more extreme and would require a fundamental reimagining of the criminal disclosure process. This would be in the form of the wholesale adoption of the 1996 proposed American Bar Association Reforms. The third potential avenue of reform is to adopt a disclosure regime similar to the one in Canada. This would represent somewhat of a middle-ground between the two paths and would vindicate the rights of accused individuals while not drastically altering the criminal justice system.

A. Brady Violations as a Method to Invalidate Guilty Pleas

1. *Roadmap for a Right*

Regardless of whether any single piece of information would change the result of a case if it went to trial, proponents of a liberal federal discovery regime have observed that access to information is not only influential at the trial stage, but also during the plea bargaining process.²⁵ Rule 11 of the *Federal Rules of Criminal Procedure* requires that a defendant who is pleading

²⁵ Ronald J Allen et al, *Criminal Procedure: Adjudication and Right to Counsel*, 2nd ed (New York: Wolters Kluwer, 2016) at 1185.

guilty does so knowingly and voluntarily.²⁶ I would suggest that knowing the information the prosecution intends to rely upon ought to be a necessary step to satisfy these criteria. However, under the current state of the law it is unclear if jurisprudence is evolving in this direction.

Looking directly at the applicability of *Brady* to plea bargaining, in *Ruiz* the Supreme Court expressly held that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”²⁷ The Court reached this conclusion by looking at the purpose for the *Brady* rule, and finding that “the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea.”²⁸ The Supreme Court went even further in rejecting a *Brady* requirement for impeachment evidence at the plea bargaining stage by holding that there is no obligation to disclose information related to potential affirmative defenses, such as self-defence, stating: “We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining.”²⁹ This rejection of a *Brady* standard at this early stage of the criminal process was, in the view of the majority of the Court, partly because it would “significantly interf[ere] with the administration of the plea-bargaining process.”³⁰

Since *Ruiz* there has been a split amongst the federal circuits on exactly what the case stands for. The disagreement centers on whether *Ruiz* suggests that a failure to disclose material exculpatory evidence violates due process, or whether it instead is an absolute bar to *Brady* challenges as a means to invalidate guilty pleas.³¹ This disagreement arises because although the Court in *Ruiz* found that there is no *Brady* violation for a failure to disclose impeachment evidence, the Court went against the trend of their jurisprudence and drew a distinction between impeachment evidence and

²⁶ *Federal Rules of Criminal Procedure*, Fed R Crim P 11, online: <<https://www.justia.com/criminal/docs/frcrimp/>>.

²⁷ *United States v Ruiz*, 536 US 622 at 633 (USSC 2002).

²⁸ *Ibid* [emphasis in original].

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ Michael Nasser Petegorsky, “Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining” (2013) 81 *Fordham L Rev* 3599 at 3625.

exculpatory evidence.³²

The Seventh and Tenth Circuits have interpreted *Ruiz* to require the prosecution to disclose exculpatory evidence prior to the entry of a guilty plea.³³ In *McCann v Mangialardi*, the Seventh Circuit held that *Ruiz* strongly suggested that the government is required to disclose material exculpatory evidence prior to a guilty plea.³⁴ The Seventh Circuit reached this decision by finding that the Supreme Courts' basis for not requiring the disclosure of impeachment information prior to the acceptance of a plea rested on two reasons. First, impeachment information was unlikely to be "critical information of which the defendant must always be aware prior to pleading guilty";³⁵ and second, impeachment information is "special in relation to the fairness of the trial, not in respect to whether a plea is voluntary."³⁶ Based on this language, the Circuit found that a distinction was drawn between impeachment and exculpatory evidence, and therefore the Supreme Court would likely find a due process violation if the government withheld material exculpatory evidence prior to a guilty plea.³⁷

The Tenth Circuit reached a similar conclusion to the Seventh Circuit in *United States v Ohiri*.³⁸ In *Ohiri*, the Circuit court similarly interpreted *Ruiz* as drawing a distinction between impeachment and exculpatory evidence, finding impeachment evidence relevant to trial fairness only, whereas exculpatory evidence was characterized as "critical information of which the defendant must always be aware prior to pleading guilty."³⁹ The Court in coming to this conclusion also based their decision on the Supreme Court's "statement that *Ruiz*'s constitutional *Brady* rights were protected by the plea agreement's stipulation that she would receive all

³² *Ibid*. Prior to *Ruiz*, the Supreme Court had treated impeachment and exculpatory evidence as "constitutionally indistinguishable."

³³ *Ibid* at 3625-3628.

³⁴ *McCann v Mangialardi*, 337 F (3d) 782 at 787 (7th Cir 2003).

³⁵ *Ibid* [emphasis in original].

³⁶ *Ibid* [emphasis in original].

³⁷ *Ibid* at 788.

³⁸ *United States v Ohiri*, 133 F App'x 555 (10th Cir 2005) [*Ohiri*].

³⁹ *Ibid* at 562, citing *Ruiz*, *supra* note 27 at 630.

material exculpatory evidence.”⁴⁰

On the other hand, *Ruiz* has been interpreted by the Second, Fourth and Fifth Circuits as an absolute ban on applying *Brady* to guilty pleas.⁴¹ The Fifth Circuit in *United States v Conroy* held that a guilty plea precludes a *Brady* challenge.⁴² In reaching this decision the circuit held that *Brady*, at its core, protected a right to a fair trial and was therefore of no application when a defendant waived their right to trial.⁴³ Furthermore, the Circuit interpreted *Ruiz* as drawing no distinction between impeachment and exculpatory evidence, and therefore precluding all post-guilty plea claims.⁴⁴

The Fourth circuit similarly interpreted *Ruiz* to preclude post-plea *Brady* claims in *United States v Moussaoui*.⁴⁵ In *Moussaoui* the Circuit Court held that *Brady* was purely a trial right, designed to protect the right to a fair trial and a fairly achieved verdict. Therefore, an admission of guilt would negate the purpose of the right, and therefore the procedural protections that accompany it.⁴⁶

The application of *Brady* to the guilty plea process was also rejected by the Second Circuit Court of Appeals in *Friedman v Rehal*,⁴⁷ and the District Court for the Eastern District of New York in *Carrasquillo v Heath*.⁴⁸ In *Friedman* the Court rejected applying *Brady* to guilty pleas in part based on *Ruiz*, but also based on a 2000 Fifth Circuit opinion in which the Court *en banc* ruled that applying *Brady* to the guilty plea process would constitute a “new rule-one that seeks to protect a defendant’s own decision making regarding the costs and benefits of pleading and of going to trial.”⁴⁹ In *Carrasquillo* the District Court summarized the applicable law and rejected the appellant’s *Brady* claim, stating “...there is no clearly established federal

⁴⁰ Petegorsky, *supra* note 31 at 3627, citing *Ohiri*, *supra* note 38 at 562.

⁴¹ Petegorsky, *supra* note 31 at 3628–3631.

⁴² *United States v Conroy*, 567 F (3d) 174 (5th Cir 2009) [*Conroy*].

⁴³ *Ibid* at 178.

⁴⁴ Petegorsky, *supra* note 31 at 3628, citing *Conroy*, *supra* note 42 at 179.

⁴⁵ *United States v Moussaoui*, 591 F (3d) 263 (4th Cir 2010) [*Moussaoui*].

⁴⁶ Petegorsky, *supra* note 31 at 3629, citing *Moussaoui*, *ibid* at 285.

⁴⁷ *Friedman v Rehal*, 618 F (3d) 142 (2d Cir 2010) [*Friedman*].

⁴⁸ *Carrasquillo v Heath*, 2017 WL 4326491 (ED NY) [*Carrasquillo*].

⁴⁹ *Friedman*, *supra* note 47 at 154–155, citing *Matthew v Johnson*, 201 F (3d) 353 at 362 (5th Cir 2000) (*en banc*).

law requiring the production of potentially exculpatory or impeachment evidence prior to a defendant's guilty plea, the Court cannot find that the State court unreasonably applied federal law in rejecting Petitioner's *Brady* claim."⁵⁰

Based on these two different interpretations of *Ruiz*, it appears that there is a disagreement within the circuits that makes the intervention of the Supreme Court a national interest. While some would suggest that the Supreme Court's recent ineffective assistance of counsel jurisprudence might serve as a guide for reform,⁵¹ I would suggest that a broad interpretation of *Turner* as applied to existing guilty plea jurisprudence would be sufficient, with one exception. In *Turner*, though the central doctrinal question was somewhat avoided, the Supreme Court revisited the legal framework for *Brady* applications. In this case the government made two significant concessions regarding the state of *Brady* jurisprudence, acknowledging that the Supreme Court has held that the *Brady* rule's "overriding concern [is] with the justice of the finding of guilt,"⁵² and that the Government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."⁵³

2. *Remedy for Breach*

From this starting point, the central question to be decided in *Turner* was the materiality of the withheld exculpatory evidence.⁵⁴ Evidence is material within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."⁵⁵ The question before the Supreme Court was the

⁵⁰ *Carrasquillo*, *supra* note 48.

⁵¹ For example, Petegorsky, *supra* note 31 at 3641 proposes that a broad interpretation of *Ruiz*, *Lafler*, and *Missouri* could lead to the inference that *Brady* applies to the voluntariness of guilty pleas.

⁵² *Turner*, *supra* note 14 at 10, citing *Bagley*, *supra* note 11 at 678.

⁵³ *Turner*, *supra* note 14 at 10, citing *Kyles v Whitley*, 514 US 419 at 439 (USSC 1995) [*Kyles*].

⁵⁴ *Turner*, *supra* note 14 at 11.

⁵⁵ *Cone v Bell*, 556 US 449 at 469–470 (USSC 2009). In *Turner*, the Supreme Court then expanded on this concept by applying its decision in *Kyles*, holding that a reasonable probability of a different result is one in which the suppression of evidence "undermines confidence in the outcome of the trial" (*Kyles*, *supra* note 53 at 434).

“legally simple but factually complex”⁵⁶ determination of whether in light of the entire factual record, if the withheld evidence had been disclosed if the result would have been different.⁵⁷

Based on *Turner*, the most recent Supreme Court decision to interpret *Brady*, if the Seventh and Tenth Circuits are correct and *Ruiz* allows *Brady* claims to apply to guilty pleas, then in order to succeed a petitioner must simply show they would not have pled guilty if they had seen the evidence.⁵⁸

As noted earlier, there is one exception to relying on *Brady* jurisprudence alone, which would be the importation of the Supreme Court’s approach to the requirements for a showing of prejudice in *Lee v United States*.⁵⁹ *Lee* was a case involving ineffective assistance of counsel at a guilty plea based on deficient advice regarding the immigration consequences of a guilty plea.⁶⁰ A central conflict within this case was whether the test for showing prejudice was on the denial of a right, or the denial of a result, with the latter requiring a showing of a prospect of success at trial.⁶¹ The Court held that a prospect of success at trial was not required for a reversal, but instead, an individual determination of the specific factors and preferences that would have caused the accused to reject the plea.⁶² I would import this standard into the analysis, requiring a showing that based on some aspect of the withheld information the accused would not have pled guilty.

The SCOTUS in *Lafler* and *Frye* previously recognized how the method of resolution has shifted from trials to guilty pleas.⁶³ This reform simply builds on this recognition and adapts existing jurisprudence to the modern method of case resolution. Since the method of resolution has so fundamentally changed, so too must the conception and implementation of rights. The parties in a criminal proceeding are not equals in many ways, especially in a system dominated by the discretion of an adversarial party.

⁵⁶ *Turner*, *supra* note 14 at 11.

⁵⁷ *Ibid.*

⁵⁸ This would also be true if the Supreme Court would settle the disagreement between the circuits and definitively rule on this issue.

⁵⁹ *Lee v United States*, 137 S Ct 1958 (USSC 2017) [*Lee*].

⁶⁰ *Ibid* at 1963.

⁶¹ Compare reasoning *ibid* at 1971, Thomas J (dissenting).

⁶² *Ibid* at 1966.

⁶³ See *Lafler*, *supra* note 21; see also *Frye*, *supra* note 22.

However, by giving existing jurisprudence a broad reading the SCOTUS can significantly remedy this power imbalance, help avoid uninformed pleas, and bring disclosure obligations into the 21st century.

If courts are reticent or fail to reform disclosure obligations, statutory mechanisms can be used to accomplish this task. The most sweeping of these proposals was the 1994 American Bar Association proposed reform to the discovery obligations in the federal criminal justice system.

B. American Bar Association Proposed Reform

In 1994 the American Bar Association's House of Delegates approved a new set of standards for discovery obligations in the criminal justice system.⁶⁴ The organization released this updated set of standards to reflect the development of the law since its last edition, and the "growing recognition on the state and federal levels that expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system."⁶⁵ These proposed standards essentially call for full disclosure of all information in possession of the prosecution, with limited exceptions to protect safety of witnesses and privilege, which would be counterbalanced by significant defence discovery obligations.⁶⁶ The drafters noted that in crafting these new standards they were meant to be interpreted in their totality, therefore any alterations to obligations would have to be counterbalanced by changing the obligations on the other side.⁶⁷

Though these suggestions are somewhat revolutionary and would fundamentally alter the discovery process, they were grounded in an effort to create a fairer and more efficient system of discovery. The Standards were to be interpreted in light of the objectives of pre-trial procedures, which, according to the ABA, centred on efficiency and fairness.⁶⁸

Standards 11.2-1 and 11.2-2 set out a complete reciprocal relationship that was "carefully crafted to comply with applicable constitutional rules and

⁶⁴ American Bar Association, *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3rd ed (Chicago: ABA, 1996).

⁶⁵ *Ibid* at xv.

⁶⁶ *Ibid* at xvi.

⁶⁷ *Ibid* at xvii.

⁶⁸ *Ibid* at 1, standard 11-1.1, objectives of pretrial procedures.

to provide a fair balance of obligations upon the prosecution and defense.”⁶⁹ The Standards required the prosecution to not just disclose the typical *Brady/Giglio* material, but also all documents or objects in the possession of the prosecution related to the impugned conduct or character of the accused; and the names, addresses, and statements of “all persons known to the prosecution to have information concerning the offense charged”⁷⁰ and which of these people the prosecution intends to call as witnesses.⁷¹ The Standards went even further in requiring disclosure of if the defendant was subject to electronic surveillance, or search and seizure.⁷²

Interestingly, the Standards are ambiguous on a key aspect of the prosecution’s obligations, specifically at what point the prosecution was obligated to fulfil their discovery obligations. Though the standard itself was silent, the accompanying commentary made clear that the prosecution’s disclosure obligations would trigger automatically, which is to say, absent a defence request, “at a reasonable time prior to trial, to be specified in advance, so that the defense will have a meaningful opportunity to review and analyze the materials.”⁷³ The exact definition of what constituted a reasonable time was not explicitly set out, but instead was suggested that the disclosure process “should be conducted as early as possible, to enable both parties to make meaningful use of the information.”⁷⁴ This requirement of meaningful use of the information would by implication mean that disclosure would need to take place before the plea bargaining stage of the criminal process.

These Standards would have been revolutionary, fundamentally altering obligations and the balance of power within the federal system. However, it

⁶⁹ *Ibid* at 13, standard 11-2.1, commentary.

⁷⁰ *Ibid* at 11, standard 11-2.1(a)(ii).

⁷¹ *Ibid* at 11-12, standard 11-2.1(a)(i)-(viii), 11-2.1(b).

⁷² *Ibid* at 12, standard 11-2.1(c)-(d).

⁷³ *Ibid* at 13. The exact wording of the commentary is as follows:

The Third Edition Standards do not require that a specific request be made by the defense to trigger pretrial discovery obligations for the government. Such a requirement serves little purpose, and can be a trap for unwitting defense counsel. This neither enhances the fairness of the criminal justice system nor promotes equality among similarly situated defendants. Thus, under the revised rules, the prosecution has disclosure obligations in every criminal case, whether or not a defense request for discovery has been made.

⁷⁴ *Ibid* at 14.

is notable that these obligations potentially would have presented challenges during national security prosecutions, specifically under CIPA procedures, as the requirements of the two systems somewhat conflict.

While the concrete disclosure suggestions might be a step-too far for some and represent a fairly extreme position that seemingly brings the civil discovery system into the criminal sphere, the suggested remedies are notable and appear like they would be a strong step towards reform if adopted.⁷⁵ Under the proposed ABA model, non-compliance with a disclosure rule would give the court a range of options in order to mitigate the harms caused by non-disclosure. These remedies include: ordering the non-compliant party to disclose the previously undisclosed material, granting a continuance, prohibiting the non-compliant party from relying upon the undisclosed evidence, or allowing a judge to enter an order it deems appropriate in the circumstances.⁷⁶ The potential remedies also extended to sanctions directly against counsel.⁷⁷

The central idea behind this range of sanctions was that the sanction should be proportionate to the offending conduct and the purpose of the sanction should be to mitigate any unfairness caused by a failure to disclose.⁷⁸ The key difference between this proposed model, and the current federal procedure is that it is prospective, as opposed to retrospective. Since there is a free flow of information between the prosecution and the defence, disclosure errors are easier to spot and the court can fashion precise remedies to combat the specific scope of unfairness caused. Though under this system the decision of the District Court would likely be weighed against the same standard on appeal, with the same deference given to the

⁷⁵ By “Civil Discovery System,” I mean a system akin to the federal civil discovery rules that mandate a mutual open-file discovery system and exchange of all relevant information going toward the disposition of the matter, including “list of witnesses, including their phone numbers and address; the designation of witnesses whose testimony is expected to be given by deposition; and the identification and summary of other evidence that the party expects to offer.” See, for example, The Justice Project, *supra* note 3 at 7.

⁷⁶ ABA Standards, *supra* note 64 at 109, standard 11-7.1(a)

⁷⁷ *Ibid*, standard 11-7.1(b)

⁷⁸ *Ibid* at 109–111, standard 11-7.1, commentary.

decisions of the court of first instance, a failure to disclose would likely be met with harsher appellate sanctions.

This approach however, would be incredibly difficult to implement. Not only does it require the consent of political actors in a fractured political environment, but it is a fairly radical shift. Unlike an expansion, or modification, of existing jurisprudence, which evolves slowly, this reform would fundamentally reshape the landscape of the justice system. Though the proposals are laudable in effect it is perhaps too radical and would transform too many aspects of the adversarial system to a civilian, or inquisitorial, one.

C. The Canadian Approach

The third possible reform, which represents somewhat of a middle-ground between the two previous options is a wholesale adoption of the Canadian model of disclosure in criminal cases. As Professor David Ireland recognized in his 2015 article, *Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence*, Canada in the not so distant past had to grapple with the same issues that currently face the United States.⁷⁹ In Canada plea-bargaining transformed from being seen as "... a somewhat vulgar addition to the criminal justice system,"⁸⁰ to a legitimate and widely practiced method of disposing of cases.⁸¹ While plea-bargaining has been happening for much longer, a series of Supreme Court decisions in the 1990's helped legitimize and, somewhat, regulate the process by mandating broad discovery obligations on prosecutors. Under this model, the prosecution must disclose all documents in its possession or control which are relevant to the accused's case.⁸²

Though Canada's system of criminal adjudication, much like that of the United States, was not centered upon negotiated outcomes in the *Charter*⁸³ era, it has evolved to wholly embrace plea bargaining.⁸⁴ Some legal

⁷⁹ David Ireland, "Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence" (2015) 38 Man LJ 273 at 280-284.

⁸⁰ *Ibid* at 283.

⁸¹ *Ibid* at 280-284.

⁸² *R v McNeil*, 2009 SCC 3 at para 22, [2009] 1 SCR 66 [McNeil].

⁸³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [Charter].

⁸⁴ Ireland, *supra* note 79 at 280-284.

scholars see the *R v Stinchcombe*⁸⁵ decision as the first significant step in the legitimization of plea bargaining.⁸⁶ These newly required maximal disclosure obligations on the prosecution meant, according to Professor Kent Roach, that prosecutors and defence counsel would be able to reach negotiated outcomes much easier, and therefore dispose of cases pre-trial more frequently.⁸⁷

1. *R v Stinchcombe: The Origins of Open-File Disclosure in Canada*

Prior to 1991, Canada had a minimal disclosure requirement, similar to the federal system. However, the Supreme Court of Canada in *Stinchcombe* interpreted s. 7 of the *Charter of Rights and Freedoms* to impose a legal duty on the Crown to disclose all relevant information to the defence.⁸⁸

In adopting this maximal approach to disclosure, Sopinka J writing for a unanimous court, dismissed various arguments for a restrictive disclosure regime (many of which have been similarly advanced with much more success in the United States), holding that after weighing the pros and cons “...there is no valid practical reason to support the position of the opponents of a broad duty of disclosure.”⁸⁹

However, the duty imposed upon the prosecution is not absolute and the Supreme Court left the determination of what and when to disclose subject to the discretion of Crown Counsel, but reviewable upon motion to a judge.⁹⁰ The standard upon which the judge reviews the Crown’s discretion is “the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege.”⁹¹ To withhold disclosure the prosecution

⁸⁵ *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 [*Stinchcombe*].

⁸⁶ *Ibid* at 285.

⁸⁷ Kent Roach, *Due Process and Victims Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 98.

⁸⁸ *Stinchcombe*, *supra* note 85; *Charter*, *supra* note 83, s 7. Section 7 of the *Charter* reads as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

⁸⁹ *Stinchcombe*, *supra* note 85 at para 17.

⁹⁰ *Stinchcombe*, *supra* note 85.

⁹¹ *Ibid* at para 22.

must show that the documents are "clearly irrelevant, privileged, or [that their] disclosure is otherwise governed by law."⁹²

Since *Stinchcombe*, disclosure requirements for relevant materials in the possession of the prosecution have moved from a matter of prosecutorial discretion to a constitutional obligation.⁹³ If the relevance of a piece of evidence is established and there is no compelling reason not to disclose, for example withholding the identity of a confidential informant, a failure to do so will likely violate s. 7 of the *Charter*.

The Supreme Court in *R v Dixon* expanded upon the scope and application of *Stinchcombe*, holding that a right to disclosure is just one of the components of the right to make full answer and defence.⁹⁴ Infringements of the right to disclosure will not always amount to a *Charter* violation, and the Supreme Court has noted that there will be some situations in which a failure to disclose will meet the threshold test from *Stinchcombe*, but the information will only have marginal value to the issues at trial.⁹⁵ In *Dixon*, the Supreme Court set the threshold requirement for compelled disclosure fairly low, holding that "The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence"⁹⁶ Under *Dixon* an accused's right to make full answer and defence is breached:

where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.⁹⁷

⁹² McNeil, *supra* note 82 at 18, citing *Stinchcombe*, *supra* note 85 at 336.

⁹³ *Kreiger v Law Society of Alberta*, 2002 SCC 65 at para 54, [2002] 3 SCR 372.

⁹⁴ *R v Dixon*, [1998] 1 SCR 244 at para 23, 166 NSR (2d) 241 [*Dixon*].

⁹⁵ *Ibid* at paras 23–30.

⁹⁶ *Ibid* at para 21.

⁹⁷ *Ibid* at para 22 [emphasis in original].

A breach of the right to make full answer and defence will also be found if the failure to disclose affected the outcome at trial or the overall fairness of the trial process.⁹⁸

Dixon established a two-part test for determining infringements on the right to make full answer and defence, the first part looking at the reliability of the verdict, and the second looking at the fairness of the trial.⁹⁹ To assess the reliability of the result at trial "the undisclosed information must be examined to determine the impact it might have had on the decision to convict."¹⁰⁰ At this stage the onus is on the accused to demonstrate that there is a reasonable possibility that the verdict might have been different but for the prosecution's failure to disclose.¹⁰¹ This assessment of evidence would look at the totality of the evidence in the case, not the item-by-item, in order to determine the probative value of the withheld evidence and whether it would have altered the verdict.¹⁰²

A negative finding under the first branch of the test is not fatal to a *Charter* challenge. Even if an appellate court does not find that the withheld evidence would have a reasonable possibility of altering the verdict, a defendant can still succeed on appeal if they can show that "there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial process."¹⁰³ This stage of the analysis looks beyond the impact that the new evidence would have had on the trier of fact, and turns to how the new evidence would have impacted the conduct of the defence.¹⁰⁴ The reasonable possibility of affecting the fairness of the trial "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure"¹⁰⁵ This test will, for example, be made out if the defence can show that the failure to disclose robbed them of investigative

⁹⁸ *Ibid* at para 34.

⁹⁹ *Ibid* at para 36.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at 34.

¹⁰² *R v Taillefer*, 2003 SCC 70 at para 82, [2003] 3 SCR 307 [*Taillefer*].

¹⁰³ *Ibid* at 83.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Dixon*, *supra* note 94 at para 34 [emphasis in original].

resources.¹⁰⁶ The Court in *Taillefer* gave two examples of this, reasoning that the statement of a witness that could have been used for impeachment, and disclosure “to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence,”¹⁰⁷ would both satisfy this branch.¹⁰⁸

It is interesting at this stage of the comparison to reflect upon the subtle differences between the Canadian approach for finding a violation under *Dixon* and the US approach for violations of *Brady*. The key distinction between the two tests is probability (*Brady*) as compared to possibility (*Dixon*). Canada expressly rejected the approach preferred in the United States. In *Dixon*, the Court found that this standard was preferable to one requiring the accused to demonstrate probability or certainty that the fresh evidence would have affected the verdict.¹⁰⁹ In so finding the Court held:

[i]mposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations¹¹⁰

Both approaches examine how the new evidence would affect confidence in the outcome of the trial, and both require a holistic analysis of the new evidence in light of the totality of the evidence.¹¹¹ However, the Canadian approach seems to be more akin to that taken by Kagan J in her dissent in *Turner*. Justice Kagan, would have found a *Brady* violation on the grounds that the withheld evidence would have recast the trial, so much so to have undermined the confidence in the verdict.¹¹² Essentially, though it was impossible to prove retrospectively, Kagan J reasoned that if the defence had access to this previously withheld information alternative decisions could have been made that would dramatically affect the conduct of the

¹⁰⁶ *Taillefer*, *supra* note 102 at para 84.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Dixon*, *supra* note 94 at para 34.

¹¹⁰ *Ibid.*

¹¹¹ See *Turner*, *supra* note 14.

¹¹² *Ibid.*, Kagan J dissenting at 3.

defence.¹¹³ This approach was unconvincing to the majority in *Turner*, but would have been well grounded under the *Dixon* test.

2. *Stinchcombe and Guilty Pleas*

The next logical step in this analysis is therefore to question whether a failure to disclose relevant information has the power under the Canadian approach to render a guilty plea invalid. It appears from the post-*Stinchcombe* Supreme Court of Canada jurisprudence that a failure to disclose would indeed provide a post-conviction route to the invalidation of a plea.

In *Adgey v The Queen* the Supreme Court held that an accused may be permitted to change his plea, in other words withdraw a guilty plea, if they can show "that there are valid grounds for his being permitted to do so."¹¹⁴ However, in *Adgey* the Court chose not to set out an enumerated list of grounds for withdrawal of a plea.¹¹⁵ A starting point for this analysis was set out by the Court of Appeal for Ontario in *R v T(R)*, in which the Court held:

To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea.¹¹⁶

The Court of Appeal for Ontario then went on to hold that even if the requirements of validity were met, a plea could nonetheless be withdrawn if an accused's constitutional rights were infringed.¹¹⁷

The government's disclosure obligations under *Stinchcombe* arise "before the accused is called upon to elect the mode of trial or to plead."¹¹⁸ The Supreme Court has held that the decision to elect mode of trial or enter into a plea affect the rights of an accused in a profound way, and in coming to this decision it would be of great assistance to an accused to know the

¹¹³ *Ibid* at 4.

¹¹⁴ *Adgey v The Queen*, [1975] 2 SCR 426 at 431, 39 DLR (3d) 553, citing *R v Bamsey*, [1960] SCR 294 at 298, 125 CCC 329.

¹¹⁵ *Taillefer*, *supra* note 102 at para 85.

¹¹⁶ *R v R(T)* (1992), 10 OR (3d) 514 at 519, 17 CR (4th) 247, cited with approval by the Supreme Court in *Taillefer*, *supra* note 102.

¹¹⁷ *Ibid*.

¹¹⁸ *Stinchcombe*, *supra* note 85 at para 28.

strengths and weaknesses of the Crown's case.¹¹⁹ The purpose of the duty to disclose under *Stinchcombe* is integrally tied to ensuring that the decision at this stage "is made with full knowledge of the relevant facts."¹²⁰ Therefore, a failure to disclose relevant information has the potential to infringe upon an accused's right to make full answer and defence, in addition to the knowledge element of a valid guilty plea.¹²¹

In *Taillefer* the Supreme Court created a modified approach to the *Dixon* test when applied to guilty pleas.¹²² Under this modified approach the two steps of *Dixon* merge into one, since the entire analysis of the breach now centres on the accused's decision to plead guilty that they now wish to withdraw.¹²³ With this consideration in mind, LeBel J in *Taillefer* adopted the following threshold test:

The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known. Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been in possession of that information or those new avenues of investigation, leave must be given to withdraw the plea.¹²⁴

Though the Supreme Court made it clear that the test was objective, in subsequent cases the Court of Appeal for Ontario has modified the approach to be subjective.¹²⁵ This modification to the test was in part done because the validity of a guilty plea is inherently subjective, and inquiries

¹¹⁹ *Ibid.*

¹²⁰ *Taillefer*, *supra* note 102 at para 86.

¹²¹ *Ibid.*

¹²² *Ibid* at 90.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ See e.g. *R v Quick*, 2016 ONCA 95, 129 OR (3d) 334 [*Quick*]; *R v Henry*, 2011 ONCA 289, 277 CCC (3d) 293.

into whether a plea is “informed” look at the specific accused, not the reasonable person.¹²⁶

From this analysis it is clear that Canada has adopted a significantly broader disclosure obligation for prosecutors, applied it to guilty pleas, and has a significantly lower burden of proof for infringements of one’s disclosure obligations. The question that remains though is how this model could apply to the United States, a country that’s constitutional court is famously resistant to relying on foreign jurisprudence, especially when it comes to interpreting the *Constitution*.¹²⁷

3. *Application to the United States*

In a 2005 debate between himself and the late Justice Antonin Scalia, Breyer J., referring to an earlier conversation with a critical congressman stated: “If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.”¹²⁸ Justice Scalia, responding to Breyer, raised a good point: when interpreting the US constitution, other than old English law, the court ought to focus exclusively on the text of the document, the intent of the framers, and how the people understood the constitution; If that is the case then foreign law is irrelevant.¹²⁹

I would argue that while that might be true for Swiss, German, or even modern English law, Canada is *sui generis* amongst the “foreign law” regimes.¹³⁰ The *Charter of Rights and Freedoms* shares strong thematic and interpretive similarities with the American Bill of Rights, and the earliest

¹²⁶ *Quick*, *supra* note 125 at 35–36.

¹²⁷ See e.g. Norman Dorsen, “The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer” (2005) 4:3 *Intl J Constitutional L* 519.

¹²⁸ *Ibid* at 523.

¹²⁹ *Ibid* at 525.

¹³⁰ *Ibid*. Scalia J used these countries as examples because the framers of the constitution, as we can see in the *Federalist Papers*, used them as reference points while drafting the United States Constitution.

interpretations of the *Charter* placed heavy emphasis on American jurisprudence.¹³¹

Furthermore, the issue here is grounded in due process and fair trial rights, both of which flow from British law and have evolved in similar ways in North America. Beyond simply precedential roadblocks, the Canadian approach aligns with structural, historical, ethical and prudential underpinnings of the Fifth Amendment.¹³² When the first congress drafted the Fifth Amendment they sought to preserve the common-law rights deemed essential to the accusatory criminal procedure, and act as a safeguard against the importation of an inquisitorial procedure.¹³³ The Fifth Amendment, like the other parts of the Bill of Rights was a codification of the minimum level of trial rights, and was subject to expansion pursuant to the Ninth Amendment.¹³⁴ Enacting broad disclosure obligations at the guilty plea stage fulfils this framer's intent purpose of safeguarding against the slow creep of an inquisitorial system, fulfils the ethos of protecting the citizens from central government tyranny, and is grounded in the language of the Fifth and Sixth Amendments.

Applying this Canadian approach to the United States is in theory relatively straightforward, and is effectively taking the first reform that this article proposed one step further. Building upon the existing SCOTUS jurisprudence, to implement the Canadian approach would require five open minded justices to draw inspiration and guidance, but not necessarily

¹³¹ *Charter*, *supra* note 83, s 11(c); see e.g. *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 (in which the Supreme Court of Canada places considerable emphasis on *Barker v Wingo*, 407 US 514 (USSC 1972), in determining the meaning of the speedy trial right of section 11(b) of the *Charter*).

¹³² These four phrases come from Phillip Bobbitt's modalities of constitutional argument. For further explanation of the modalities, see Ian C Bartrum, "Metaphors and Modalities: Meditations on Bobbit's Theory of the Constitution" (2008) 17 Wm & Mary Bill Rts J 157 at 158.

¹³³ Thomas Davies, "Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in *Chavez v Martinez*" (2003) 70 Tenn L Rev 987 at 1007.

¹³⁴ See Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012) for discussion of how the constitution can evolve through common practice to include rights of "the people" that were not expressly delegated nor denied by the constitution - for example the right to testify at one's own trial as a fundamental aspect of the Fifth Amendment that was statute barred at founding but gained constitutional entrenchment and recognition over time.

feel bound by foreign law. In short, the distinction is a recognition that it is almost impossible, or at least unduly burdensome, to show a probability of a different outcome retrospectively, and an adoption into US law of the Canadian requirement of a possibility of a different outcome.

V. THE PATH FORWARD

Adopting more expansive disclosure rights in the United States would be a step-forward, but no more than any other doctrinal revision that seeks to bring procedural protections in line with the actual functioning of the criminal justice system. In a world dominated by guilty pleas, as opposed to trials, rights that were first envisioned as protecting an individual from rogue state agents at trial need to be reimagined and reinterpreted to apply to 97% of cases, not just 3%. After all, what use is a constitutional protection if the vast majority of defendants have no ability to take advantage of it.

This article has presented three pathways for reform to a pernicious problem in American criminal procedure. These suggestions were presented in somewhat of a goldilocks pattern, with the first being too little, the second being too aggressive, and the third being “just right.” While adoption of the ABA guidelines would likely be the most effective avenue of reform, it is a significant departure from current federal practice and its implementation might be impractical. Turning to the more practical solutions proposed, dissent in *Turner* seems to indicate at least a portion of the court would be receptive to expanded disclosure obligations and expanded review procedures for when the prosecution falls short. The Canadian approach, based in large part on its holistic review mechanism, lower burden of proof on the rights claimant, and recognition of how truly integrated plea bargaining is in the justice system would be the best path of reform. However, as mentioned *supra*, beyond the roadblock of simply recognizing a problem, the SCOTUS is extremely resistant to foreign jurisprudence when interpreting their own constitution.

While I am cautiously optimistic that the door has been opened to use *ex juris* case law as an aid for normatively assessing the possibilities of reform, I am at the same time cognizant that any reform will likely have to be strongly grounded in existing precedent. As such, regardless of what might be the best route forward, the arc of case law will likely have to take a more winding path towards reform. Nonetheless, whether the SCOTUS

broadens disclosure obligations through an expansion of *Ruiz* or innovates along the lines of the *Stinchcombe/Dixon* framework, it will be a considerable and necessary step forwards.